UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	)
VITAMINS ANTITRUST LITIGATION,	)
	)
	) Misc. No. 99-197 (TFH)
	) MDL No. 1285
THIS DOCUMENT RELATES TO:	)
	)
Bristol-Myers Squibb Co. v. Rhone-Poulenc, et al.	)
NBTY, Inc., et al. v. F. Hoffman-LaRoche, Ltd., et al.	)
Perrigo Co, et al. v. F. Hoffman-LaRoche Ltd., et al.	)
Natural Alternatives Internatl., Inc., et al. v. F. Hoffman-LaRoche, Ltd., et al.	)
Leiner Health Products, Inc., et al. v. F. Hoffman-LaRoche, Ltd., et al.	)

MEMORANDUM OPINION Re: BMS Reconsideration

Pending before the Court is Bristol-Myers Squibb Company's ("BMS") Motion to Reconsider That Portion of the Court's May 9, 2000 Opinion Relating to the Donnelly Act.[1] Upon careful consideration of BMS's Motion, Degussa-Huls Corporation's ("Degussa") opposition, BMS's reply, the oral arguments presented at the September 13, 2000 hearing, and the entire record herein, this Court will deny BMS's Motion for Reconsideration.

I. BACKGROUND

On January 18, 2000, Degussa moved to dismiss the NBTY, Inc., et al. Consolidated Amended Complaint. On May 9, 2000, the Court issued a Memorandum Opinion resolving

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[1] The "NBTY plaintiffs" filed a joinder to this Motion. Accordingly, this Opinion also relates to the actions of NBYT, Inc, et al. v. F. Hoffman-LaRoche, Ltd., et al., Perrigo Co, et al. v. F. Hoffman-LaRoche, Ltd., et al., Natural Alternatives Internatl., et al. v. F. Hoffman-LaRoche, Ltd., et al., and Leiner Health Products, Inc., et al. v. F. Hoffman-LaRoche, Ltd., et al. (hereafter, "NBTY, et al.").

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various motions to dismiss; in that Opinion, the Court granted Degussa's Motion to Dismiss all claims asserted under the Donnelly Act for indirect purchases that had occurred prior to the December 23, 1998 Amendment to that Act. At the May 17, 2000 status conference, this Court granted BMS permission to file a Motion for Reconsideration of the Court's Donnelly Act ruling, because BMS's case had only recently been transferred to this Court and it had thus been unable to participate in the original briefing on this issue.

On June 1, 2000, BMS filed the instant Motion for Reconsideration of the Court's May 9, 2000 Opinion granting Degussa's Motion to Dismiss claims under § 340(6) of the Donnelly Act for indirect purchases occurring before December 23, 1998.[2]

II. STANDARD OF REVIEW

This is an issue of first impression, and this Court, sitting in diversity, is obligated to act as New York's highest court would act if given the instant issue for determination. Since the New York Court of Appeals has never faced or specifically decided whether indirect purchasers may sue for damages under the Donnelly Act for purchases occurring before the enactment of the 1998 Amendment, the Court will consider the plain language of the Amendment, the legislative history, and the relevant caselaw on this issue.

III. DISCUSSION

Since the enactment of the Donnelly Act in 1909, New York has prohibited "arrangements, agreements or combinations," including price-fixing conspiracies, that

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[2] The Court was later informed that defendants DCV, Inc. and DuCoa L.P. had incorporated Degussa's arguments regarding indirect purchaser claims under the Donnelly Act into their motions to dismiss. To the extent that DCV, Inc. and DuCoa L.P. and any other defendants had adopted these arguments, this Opinion would include their motions as well.

"unlawfully interfer[e] with the free exercise of any activity in the conduct of any business, trade or commerce." General Business Law, § 340(1). On December 23, 1998, section 340(6) was enacted. That section provides, in pertinent part:

> In any action pursuant to this section, the fact that the state or any political subdivision or public authority of the state, or any person who has sustained damages by reason of violation of this section has not dealt directly with the defendant shall not bar or otherwise limit recovery; provided, however, that in any action in which claims are asserted against a defendant by both direct and indirect purchasers, the court shall take all steps necessary to avoid duplicate liability, including but not limited to the transfer and consolidation of all related actions.

Therefore, it is undisputed that as of December 23, 1998, indirect purchasers had a right to sue for damages under the Donnelly Act. The critical question in this case is whether that right authorizes indirect purchasers to assert claims based on sales made before § 340(6) became effective.

Degussa argues that the Court should dismiss indirect purchaser claims based on sales made prior to December 23, 1998, the date § 340(6) took effect; because the general rule in New York is that statutes should only be applied prospectively and the 1998 Amendment is a substantive rather than a remedial change in the law, and § 340(6) therefore should not be applied retroactively in this case. On the other hand, BMS argues that (1) even prior to the enactment of this Amendment, indirect purchasers were entitled to assert claims under the Donnelly Act; (2) allowing indirect purchasers to assert claims for sales that predate the enactment of § 340(6) is compelled by the plain language of the statute and thus does not require retroactive application; and (3) even assuming retroactive application is necessary, § 340(6) should be retroactively applied because it falls within § 54's exception for remedial statutes to the general rule against

retroactive application.

A. Status of Indirect Purchaser Standing Prior to the 1998 Amendment

BMS argues that indirect purchasers were entitled to recover under the Donnelly Act before the enactment of § 340(6). This Court disagrees. While it is true that the New York Court of Appeals has not specifically considered or decided this issue, the majority of New York lower courts that have faced this issue have barred indirect purchaser suits under the Donnelly Act. See, e.g., Levine v. Abbott Laboratories, et al., No. 117320/95 (N.Y. Supreme Ct. 1996) (Exhibit B to Bristol-Myers Mem.)[3]; Russo & Dubin v. Allied Maintenance Corp., 95 Misc.2d 344, 407 N.Y.S.2d 617, 621 (Sup. Ct. N.Y. Co. 1978); see also X.L.O. Concrete Corp. v. Rivergate Corp., 83 N.Y.2d 513, 518 (N.Y. 1994) ("This Court has held that the Donnelly Act, having been modeled on the Federal Sherman Act of 1890, should generally be construed in light of federal precedent and given a different interpretation only where state policy differences in the statutory language or the legislative history justify such a result"). The purported contrary authorities cited by BMS – including an article by an attorney in the New York Antitrust Bureau and an appellate argument by the Attorney General's Office in a case that was never decided on appeal -- are not found in any caselaw and are certainly not dispositive here.

Moreover, the legislative history cited by BMS is far from clear and, if anything, appears

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[3] It is worth noting that BMS was a party to the Levine case and successfully argued against indirect purchaser liability under the Donnelly Act in that action. See Def's Exhibit A at 3 (BMS is a listed defendant for the brief that argues that "Plaintiffs' indirect-purchaser claim under the Donnelly Act must be dismissed as a matter of law under controlling New York precedent"), 8 ("Just as Plaintiffs' indirect-purchaser claim would be barred under federal antitrust law, it is barred under the Donnelly Act") and 10 ("State policy, statutory language and legislative history only confirm the conclusion that New York antitrust law should follow the Illinois Brick bar against indirect purchaser actions").

to reflect the understanding that prior to the enactment of § 340(6), New York did not allow indirect purchasers to sue for antitrust violations.[4] See BMS's Exhibit A at 32 ("as a retail sufferer of the antitrust violation, you can't even bring your proof right now"). In fact, the legislative history of the Donnelly Act prior to the 1998 Amendment strongly supports Degussa's position. Although bills authorizing indirect purchaser recovery under the Donnelly Act were proposed twice prior to the enactment of § 340(6) -- once in 1982 and again in 1989 -- such legislation was not enacted until 1998 with the passage of § 340(6). See N.Y.A. 12749, 1981-82 Regular Sess. (1982); N.Y.S. 5030, 1989-90 Regular Sess. (1989); and N.Y.A. 5266, 1989-90 Regular Sess. (1989). Therefore, there is no compelling support for BMS's argument that indirect purchasers had standing to sue for violations of the Donnelly Act before the enactment of § 340(6).

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[4] In their reply, BMS argues that although the legislature intended the Donnelly Act to be consistent with federal antitrust law, the enactment of the Donnelly Act was prior to the Supreme Court's decision in Illinois Brick and at that time the "vast majority of federal courts, including the Second Circuit, interpreted the Sherman Act to allow indirect purchaser recovery." Pl's Reply at 7. BMS offers only one case, West Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1088 (2d Cir. 1971), to support this assertion and that case discussed the issue only in dicta and therefore is not dispositive. See Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481, 485 (S.D.N.Y. 1973) (rejecting proposed intervenors' reliance on West Virginia v. Charles Pfizer, because the "sole question presented [in West Virginia] was whether the District Court had abused its discretion in approving a settlement proposed by most of the wholesalers, retailers, individual customers and defendants" and the West Virginia Court "expressly recognized that it was not called upon to decide the question raised here, specifically stating that it 'should not reach any dispositive conclusions on [this] admittedly unsettled legal [issue]. . .'"). Moreover, the Donson Court noted that "[n]o court actually faced with the problem [of indirect purchaser liability under the Sherman Act] since Hanover has held that the ultimate consumers, rather than those more directly injured, are the proper parties to avail themselves of the provisions of the Sherman Act. Instead, the Courts have uniformly held precisely the contrary." Donson, 58 F.R.D. at 485.

B. The Plain Language of the Amendment

Next, BMS argues that there is no need to determine whether to apply § 340(6) retroactively or prospectively because the plain language of the statute dictates that, as of December 23, 1998, "any person who has sustained damages by reason of a breach of this section" is entitled to sue under the Donnelly Act and the fact that such a person "has not dealt directly with the defendant shall not bar or otherwise limit recovery . . . " (emphasis added). Since this Amendment was expressly written "to take effect immediately," BMS contends that the plain language compels the conclusion that § 340(6) was intended to provide indirect purchases with a remedy, even if the conduct at issue occurred before the date of this Amendment.

The potential problem with BMS's reading of § 340(6) is that it necessarily requires the Court to apply the Amendment retroactively.[5] Since retroactive interpretations are allowed only in remedial statues or in cases where the legislative intent is clear and unambiguous[6], the Court must consider whether different interpretations of this Amendment are possible. Degussa offers such an alternate reading in its briefs, where it argues that § 340(6) was intended to give indirect

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5 Under New York law, a retroactive statute "is a law which looks backward affecting acts occurring or rights accruing before it came into force." West Publishing Co., McKinney's Consol. Laws of N.Y., Book 1, Statutes, § 51(a) (1971) ("McKinney Statutes Law").

6 New York law dictates that a statutory "amendment will have prospective application only, and will have no retroactive effect unless the language of the statute clearly indicates that it shall receive a contrary interpretation." McKinney Statutes Law § 52. This is particularly true where the plain language of the statute dictates that it "shall take effect immediately." Id. (comment); see also Majewski v. Broadalbin-Perth Central School District, 91 N.Y.2d 577, 583-84 (N.Y. 1998) ("It takes a clear expression of the legislative purpose to justify retroactive application").

purchasers standing where previously they had none but that it is necessarily limited to transactions which occurred after the passage of this section since the language of the Amendment does not explicitly state otherwise.[7]

Given the ambiguous language of the Amendment and the fact that two vastly different interpretations of this section are possible, the Court cannot find that § 340(6), on its face, evinces clear legislative intent to allow recovery for indirect purchases occurring before December 23, 1998. Therefore, this Court must consider whether the Amendment should be given prospective or retroactive effect.

C. Retroactive versus Prospective Application

BMS argues that to the extent that it did modify preexisting law, § 340(6) should be classified as a remedial statute and thus should be given retroactive effect pursuant to N.Y. Statutes Law § 54. Section 54 provides that:

> Remedial statutes constitute an exception to the general rule that statutes are not to be given retroactive operation, but only to the extent that they do not impair vested rights.

The Comment to Section 52, which dictates the general rule for prospective application in the absence of clear legislative intent to the contrary, also discusses the exception for remedial statutes: "if an amendment provides a remedy for a wrong or enforcement of a right where none

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[7] The Comment to McKinney Statutes Law § 54 clearly states that, under New York law, the presumption of prospectivity applies to all statutes "whereby a new right is established even though it is remedial." McKinney Statutes Law § 54 (Comment). The 1998 Amendment to the Donnelly Act could be interpreted as providing indirect purchasers a new right to claim damages for antitrust violations where none existed before. Further support for this interpretation may be found in the use of the word "shall," which is generally understood to indicate that prospective construction was contemplated. See Dillon v. Coughlin, 539 N.Y.S.2d 880, 885 (N.Y. Sup. Ct. 1989).

before existed, it is prospective, but if the right to recover existed before, and the amendment relates to procedure and merely prescribes a remedy, the amendment is retroactive." N.Y. Statutes Law § 52 (Comment). The New York Court of Appeals has defined "remedial" as "designed to correct imperfections in prior law, by giving relief to [an] aggrieved party." See In the Matter of Arnold M. Asman v. Ambach, 64 N.Y.2d 989, 991 (N.Y. 1985).

BMS contends that § 340(6) is remedial because it was designed to correct an imperfection in the law or to provide a new remedy for an existing wrong. On the other hand, Degussa argues that this Amendment is not a remedial change in the law because (1) indirect purchaser standing is a substantive principle of antitrust law and thus does not go solely to remedy; (2) the 1998 Amendment creates new rights for indirect purchasers and affects extant rights and liabilities of both antitrust defendants and direct purchasers; and (3) an interpretation of the 1998 Amendment that would allow it to operate retroactively potentially implicates constitutional questions.

1. Substantive versus Procedural Change

The Court disagrees with BMS's assertion that § 340(6) is a procedural change, affecting only available remedies, rather than a substantive change in the Donnelly Act. In fact, in holding that indirect purchasers were not "injured" in their business or property within the meaning of Section 4 of the Clayton Act, the Supreme Court expressly referred to indirect purchaser standing as a substantive principle of antitrust law. See Illinois Brick Co. v. Illinois, 431 U.S. 720, 745-46 (1977) (emphasizing that this ruling did not address standing in the constitutional/procedural sense but rather constituted a substantive principle of antitrust law that indirect purchasers' injuries were too remote to be redressed under the Clayton Act). Therefore, although New York

is entitled to expand its antitrust laws to reach indirect purchasers, it is clear that an Amendment creating this right to recovery for indirect purchasers would be viewed as substantive rather than merely procedural.

2. Creation of New Rights and Liabilities

The Comment to McKinney's Statutes Law § 54 clearly states that, under New York law, the presumption of prospectivity applies to all statutes "whereby a new right is established even though it is remedial." McKinney Statutes Law § 54 (Comment). This Court finds that the 1998 Amendment to the Donnelly Act created a new right where none existed before and thus should not be applied retroactively.

New York courts have consistently barred retroactive application of statutes where these laws create new rights and new liabilities. See, e.g., Jacobus v. Colgate, 217 N.Y. 235, 111 N.E. 837 (N.Y. 1916); Buccino v. Continental Assurance Co., 578 F. Supp. 1518 (S.D.N.Y. 1983); Burns v. Volkswagen of America, Inc., 460 N.Y.S.2d 410, 412 (N.Y. Sup. 1982), affirmed 468 N.Y.S.2d 977 (N.Y.A.D. 1983); see also Hughes Aircraft Co. v. United States, 520 U.S. 939, 950 (1997) (Court refused to apply statutory amendment expanding private party standing for *qui tam* suits retroactively because it "essentially create[d] a new cause of action"). The rationale for limiting retroactive applications of such statutes is to avoid affecting antecedent rights. See McKinney Statutes Law § 53. In this case, the 1998 Amendment affects the antecedent rights of both direct purchasers and defendants by invalidating a previously valid defense and altering the apportionment of recoverable damages.[8]

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[8] The antecedent right affected need not be constitutionally protected from change in order for the presumption against retroactivity to apply. See McKinney Statutes Law § 53 (Comment) ("So a preexisting right or liability, whether or not it is

Until the passage of § 340(6) in December of 1998, direct purchasers were entitled to all damages for any overcharges caused by Donnelly Act violations. To the extent that indirect purchasers are able to recover any money for violations of this Act, the direct purchasers' right to damages are clearly diminished. Since Donnelly Act claims accrue upon injury, retroactive application of § 340(6) would clearly affect the antecedent rights of these direct purchasers by reducing the value of their recoverable damages.

Moreover, retroactive application of this Amendment would also strip defendants of a defense which was still viable at the time that these Donnelly Act violations occurred. Defenses accrue when all acts necessary to the defense are complete and the right to such a defense may not be impaired by subsequent legislation. See Hughes Aircraft Co., 520 U.S. at 950 (refusing to apply retroactively amendment permitting private parties to maintain a *qui tam* action even if the information underlying the suit was already in the government's possession; because although the amendment did not increase the defendant's monetary liability or change the standards for liability, it divested the defendant of a defense, essentially lack of standing, that was viable at the time that plaintiff's claim accrued); Dorfman v. Leidner, 541 N.Y.S.2d 278, 279 (N.Y. A.D. 1989) (refusing to apply retroactively an amendment changing service rules passed after invalid service was effected but before defendant moved to dismiss; "accepting for purposes of our analysis the argument that the amendment is remedial, we nevertheless find that it should not be given retroactive effect because defendant has a vested right in the defense of lack of personal jurisdiction which may not be impaired by retroactive application of the amendment").

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constitutionally protected from change, will not be affected by legislation, unless legislative intent to the contrary is obvious").

Therefore, since retroactive application of the 1998 Amendment would deprive direct purchaser plaintiffs and defendants of antecedent rights, § 340(6) should be applied prospectively only.

3. Potential Constitutional Problems

Retroactive application of the 1998 Amendment is also improper because it would most likely increase defendants' liability. As the New York Court of Appeals has explained,

> A statute which imposes a greater liability on defendants and confers an additional benefit on plaintiffs in actions to recover damages for wrongs is not construed to have retroactive effect, in the absence of circumstances of its adoption establishing a contrary intent.

Campbell v. New York Evening Post, Inc., 157 N.E. 153, 154 (N.Y. 1927). Although § 340(6) specifically seeks to avoid duplicative liability under the Donnelly Act, this Court finds that the creation of a private right of action for indirect purchasers to claim treble damages, if that cause of action is to have any consequence at all, would undoubtedly increase defendants' liability.[9]

Because treble damages are punitive in nature and since the amended statute will likely increase defendants' liability, retroactive application of the statute would raise potential constitutional concerns under the ex post facto and due process clauses. See Landgraf v. USI Film Products, et al., 511 U.S. 244, 281 (1994) (retroactive application of amendment creating right to treble damages would raise "serious constitutional question"); Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966, 972 (2d Cir. 1985) (refusing to apply treble damages

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[9] In a case such as this one, involving both indirect claims under state law and direct claims under federal law, the only way to avoid "duplicative recovery" is to deny indirect purchasers any overcharge damages at all, since presumably all antitrust injuries were redressed through the federal proceeding.

provision of Trademark Act amendment retroactively because retroactive application potentially violated the Ex Post Facto Clause of the Constitution). Where a statute may be construed to have either retroactive or prospective effect, a court will choose to apply the statute prospectively if constitutional problems can thereby be avoided. Louis Vuitton S.A., 765 F.2d at 971. It is not necessary for the Court to determine that retroactive application of the Amendment would definitely violate constitutionally protected rights. When interpreting a statute, "courts have long applied the 'cardinal principle' that a fair construction which permits the courts to avoid constitutional questions will be adopted." Id. Denying a statute retroactive effect is justified as long as there is "an indication that the constitutional question is 'non-frivolous.'" Id. Since retroactive application of § 340(6) raises potential ex post facto and due process concerns by likely causing significant increases in defendants' liability, the Court should interpret the 1998 Amendment to operate prospectively only.

IV. CONCLUSION

For the foregoing reasons, the Court will deny BMS's Motion for Reconsideration. An order will accompany this Opinion.

October 6, 2000

Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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ORDER Re: BMS Reconsideration

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that Bristol-Myers Squibb Co.'s Motion for Reconsideration is **DENIED**. It is further hereby

ORDERED that the relief extended to Degussa-Huls Corp. by virtue of the Court's May 9, 2000 Opinion, granting Degussa-Huls Corp.'s Motion to Dismiss with respect to claims asserted under the Donnelly Act for indirect purchases made prior to December 23, 1998, is extended to DCV, Inc. and DuCoa L.P., as well as any other defendants that had explicitly incorporated this argument into their motions to dismiss.

October 6th, 2000

Thomas F. Hogan
United States District Judge